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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.....

JAMES M. FOSTER and JOHN H. JOHNSON, Co-Partners, d/b/a J. M. FOSTER AND COMPANY,
Petitioners,
vs.
CLARENCE H. BUCKNER,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, above named, respectfully pray for a writ of certiorari to the United States Court of Appeals

for the Sixth Circuit to review the decision of that Court filed April 7, 1953, as amended May 13, 1953, after consideration of a petition for rehearing, but nevertheless affirming a jury verdict and judgment for $136,500.00 against petitioners.

OPINIONS BELOW

The opinion of the Court of Appeals as amended is as yet unreported, but appears in Volume II, pages 482 to 487 and 499, respectively, in the certified copy of the transcript of record on file in this court.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This is an action brought by Clarence H. Buckner, respondent, to recover damages for personal injuries sustained June 30, 1949, when he fell a distance of about 70 feet during the course of his employment as a painter of the structural iron work in a steel plant under construction for the McLouth Steel Company in Trenton, Michigan. He was an employe of a painting subcontractor. The immediate cause of the fall was the entanglement of a long rope with an over-head traveling crane used by petitioners in the furtherance of their work as subcontractors, placing machinery. This was in no way related to respondent's work. The rope, about 75 feet long, was under the sole control of respondent. He used it to raise and lower a so-called aluminum pick or platform on which he and his partner worked (R. 258, 310-312, 314). The pick was about 18 inches wide and 22 to 26 feet long without hand-holds or railings (R. 141, 257).

The traveling crane is of the type supported by two sets of rails that extend the full length of the building near the top of the walls (R. 78). The span of the crane is 85 feet from the center of one rail to the other (R. 349). The building is about 1000 feet long and approximately 80 feet high from the floor to the apex of the peaked roof. The crane can be moved back and forth the full length of the building (R. 78).

Respondent's fall occurred while he and his partner were changing from a higher to a lower position. The entire operation required about eight minutes (R. 267). The only observation made by either one of these men with reference to the crane was just before they started to move the pick, ropes and paint (R. 154, 168, 263, 264). A moment or so before the accident, respondent was climbing down a beam. He got onto the pick in its new and lower position and then in his own words the accident occurred as: "I just got back on there and I started to turn around when the crane hit me, or the rope, or whatever was hanging down" (R. 267-268). He admitted that the crane operator below could do nothing that would dislodge the rope from the pick (R. 309-310). His working partner said that respondent's foot might have knocked the rope off the pick (R. 173).

Trial was had by jury and a verdict and judgment was rendered in favor of respondent for $136,500.00 on April 16, 1952. During the course of trial petitioners made timely motions for a directed verdict of no cause for action and a mistrial. These were denied. Thereafter further motions for judgment *non obstante veredicto* and a new trial were made. All were denied (R. 469, 471).

On the date of accident respondent and his employer were subject to the Michigan Workmen's Compensation

Law (R. 11). The Michigan State Accident Fund was the compensation insurance carrier (R. 48). The Michigan Workmen's Compensation Law in effect at that time provided:

> "Where the injury for which compensation is payable * * * was caused under circumstances creating a legal liability in some person other than the employer to pay damages * * *, the employe may at his option proceed either at law against that person * * *, or against the employer for compensation under this act, but not against both and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance as the case may be, the liability of such other person." (Sec. 17.189, Mich. Stat. Ann., Sec. 413.15, Mich. Comp. Laws, 1948.)

Respondent filed his suit October 11, 1949. On this date the workmen's compensation carrier was paying and thereafter continued to pay hospital and nursing expenses in behalf of respondent. It paid $12,916.25 over a period of one year immediately following the accident (R. 59). Petitioners contended that this barred respondent from maintaining this action (R. 10, 26-28). They raised the point on motion for summary judgment (R. 26-27). The trial court ruled against this contention in a formal order (R. 29). The Court of Appeals upheld this ruling and in doing so stated in part:

> "In fact, plaintiff did not know that these expenses had been paid by the carrier" (R. 486).

This statement in the form of a fact is wholly unsupported by the record and is contrary to an admission by respondent's counsel in his opening statement to the jury that respondent not only received the benefits referred to, but did so "upon his agreement to repay the Michigan State

Accident Fund * * *" (R. 87). He had previously admitted receipt of such benefits at pre-trial hearings (R. 54, 55). Respondent's counsel insisted "that this question should be disposed of by the court prior to trial" (R. 47). The trial judge's reaction in this regard is reflected in one of several pre-trial comments:

> "That is a law question, and I have to decide it myself. I am not going to let a jury decide whether or not I have jurisdiction to hear this matter, so we are going to make a pre-trial determination of that * * *" (R. 50).

The Court of Appeals, in ruling that respondent had not made an election, gave retroactive effect to an amendment of the Michigan Workmen's Compensation Law, particularly the above quoted section. The amendment eliminates the necessity of making a binding election. Pub. Acts 1952, No. 155, effective September 18, 1952.

Respondent's chief allegation of negligence was the failure to have a lookout man ride on top of the crane (R. 3). However, he admitted that no such lookout man was ever used. He said: "* * * I never had seen a safety man on the crane" (R. 307). Actually, petitioners and respondent's employer each had a safety man on the ground (R. 351, *et seq.*, and 331 *et seq.*).

Respondent had been on this job for several months (R. 305). He not only knew that that no so-called safety man was employed to ride on the crane, but was also conscious of the great noise in the building and difficulty of hearing the crane in operation or the sound of the warning bell with which it was equipped (R. 306). He knew if his rope were to drop without adjustment as to length and fall in the path of the moving crane there would be danger of an accident (R. 310-312), but did nothing to eliminate this danger (R. 314). Except for the initial observation when

respondent and his partner started to move, they made no further observations for the crane. This general background led petitioners to plead that respondent assumed the risk of injury and that his injuries were caused in whole, or in part, or were contributed to by his own negligence (R. 9). The trial judge refused to give a requested instruction on the assumption of risk doctrine (R. 42), but referred to it in his charge as follows:

> "Whatever risks Mr. Buckner may have assumed as inherent in the dangerous work at which he was employed, he did not assume the risk of being injured through the negligence of some other person" (R. 443).

The Court of Appeals held that the doctrine of assumption of risk is not applicable (R. 485), citing *Restatement of the Law of Torts*, §466.

Petitioners' several motions raised all the points discussed so far and included further assignments why (1) a verdict of no cause for action should have been directed (2) a mistrial declared and (3) a new trial granted. These assignments covered alleged prejudicial conduct by respondent's counsel; prejudicial statements, rulings and instructions by the trial judge, refusal to instruct the jury as requested and excessiveness of verdict. The Court of Appeals overruled all contentions of error and affirmed the judgment of the District Court.

Petitioners filed a petition for rehearing. This was denied, but resulted in an amendment of the opinion originally filed by striking the sentence "As he prepared to climb down, plaintiff saw the crane was not moving" and substituting therefor the following sentence: "As the plaintiff prepared to climb down, the crane was not moving" (R. 499).

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 1254 (1). The decision entered April 7, 1953, as amended May 13, 1953, is sought to be reviewed, and the date of this application for certiorari is June 8, 1953.

QUESTIONS PRESENTED

1. Whether under the Michigan Workmen's Compensation Law in effect June 30, 1949, respondent is barred as a matter of law from maintaining this action.

2. Whether the 1952 amendment of the Michigan Workmen's Compensation Law, Pub. Acts 1952, No. 155, is retroactive.

3. Whether the assumption of risk doctrine as published in the Restatement of the Law of Torts, §466, was correctly stated and applied by the Court of Appeals.

4. Whether the facts related in the opinion of the Court of Appeals are supported in the record.

5. Whether petitioners' motion for a mistrial should be granted.

6. Whether petitioners' motions for a directed verdict of no cause for action should be granted.

7. Whether petitioners' motion for judgment *non obsatnte veredicto* should be granted.

8. Whether petitioners' motion for a new trial should be granted.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Court of Appeals, in holding that respondent had not elected to take compensation decided an important question of local law in a way probably in conflict with applicable local decisions, to illustrate, *Schulmeyer v. Central Motor Freight Co.*, 323 Mich. 142, 35 N. W. 2nd 225. Said ruling is also probably in conflict with *Dinardo v. Consumers Power Co.*, 181 Fed. (2d) 104, decided by the Court of Appeals from which the instant appeal is sought.

2. The Court of Appeals, in ruling that the 1952 amendment of the Michigan Workmen's Compensation Law, Pub. Acts 1952, No. 155, is retroactive, decided an important question of local law in a way probably in conflict with applicable local decisions, in particular, *Tarnow v. Railway Express Agency*, 331 Mich. 558.

3. The Court of Appeals erred in stating its conception of the elements of the assumed risk doctrine and citing in support thereof the *Restatement of the Law of Torts* §466. The rule as stated by the Court of Appeals fails to take into account that the Restatement rule is predicated on the theory that a plaintiff may be guilty of contributory negligence if he intentionally and unreasonably exposes himself "to danger created by the defendant's negligence of which danger the plaintiff knows or has reason to know, * * *"

4. The Court of Appeals' opinion is predicated on statements of fact not supported in the record.

5. The Court of Appeals should have ruled favorably on petitioners' motion for a mistrial in the trial court because of the prejudicial injection of insurance into the case in the presence of the jury.

6. The Court of Appeals should have ruled favorably on petitioners' several motions for a directed verdict of no cause for action and for judgment *non obstante veredicto.*

7. The Court of Appeals should have granted petitioners' motion for a new trial.

8. In holding that no prejudicial error was committed against petitioners and that they had a fair and impartial trial, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

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Dated: June 8, 1953.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.....

JAMES M. FOSTER and JOHN H. JOHNSON, Co-Partners, d/b/a J. M. FOSTER AND COMPANY,
Petitioners,
vs.
CLARENCE H. BUCKNER,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is intended, not as petitioners' brief on the merits if the writ shall be granted, but to show that the reasons relied on for allowance of the writ are substantial and important, that the decisions below were probably erroneous, and that they call for authoritative determination by this Court.

The reasons relied on will be briefly discussed in the order stated in the petition for the writ under the following abbreviated headings.

I.

RESPONDENT'S ALLEGED ELECTION OF REMEDIES UNDER THE MICHIGAN WORKMEN'S COMPENSATION ACT

Respondent's acceptance of benefits as admitted by his counsel (R. 54, 55, 87) eliminated him as a real party in interest and by statute and decisions subrogated the Michigan State Accident Fund as the only party who might maintain an action. This conclusion finds support in the case of *Dinardo v. Consumers Power Co.*, 181 Fed. (2d) 104, decided April 3, 1950, by Judge Allen of the Sixth Circuit. That case involved the application of the very section of the Michigan Workmen's Compensation Law as in effect June 30, 1949, the date of accident in the instant case. The Court of Appeals recognized that Michigan decisions before 1943, that being the year of an important amendment, were no longer controlling on the question of election of remedies. In the case at bar, as well as the *Dinardo* case, *supra*, the Court of Appeals cited *Fox v. Detroit United Ry.*, 218 Mich. 5, a 1922 decision, for the proposition that a person "had not elected to proceed against the employer for compensation by his acquiescence in payment of hospital and doctor bills by the employer's workmen's compensation carrier." Reliance on the *Fox* case for that proposition at this late date overlooks the 1943 amendment of the Michigan Compensation Law and also the case of *Dornbos v. Block & Guggenheimer, Inc.*, 326 Mich. 626, decided in 1950, where it was held that the "compensation" provided in the compensation act is not only the award in lieu of prospective earnings which the employee loses in consequence of his injury but includes medical, surgical and hospital services. The Court of Appeals did not consider the *Dornbos* case in its opinion, even though it is extensively discussed in petitioners' appellate brief. It is

important to note the trial judge's definition of "compensation." He said:

> "My understanding of compensation payments to an employee is the person who paid a check, not because of medical expense but a check in payment of the time he was away from work" (R. 54).

The lower courts also by-passed *Schulmeyer v. Central Motor Freight Co.*, 323 Mich. 142, which is discussed and cited in the *Dinardo* case. In other words, the trial court and the Court of Appeals failed to apply and follow a well adjudicated local law as required by *Erie Railroad Co. v. Tompkins*, 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487.

II.

THE RULING BY THE COURT OF APPEALS THAT THE 1952 AMENDMENT TO THE MICHIGAN COMPENSATION LAW IS RETROACTIVE AND APPLICABLE TO THE CASE AT BAR

Up to now the Michigan Supreme Court has had no occasion to consider this amendment in any of its aspects. It contains no language indicating that the legislature intended it to operate retrospectively, on the contrary, it is quite clear that it was intended to be applied prospectively. The Michigan Supreme Court followed the generally accepted view, especially where a statute is not wholly procedural or remedial in character, that there is a presumption that legislation operates prospectively, unless the legislature clearly indicates otherwise. *Tarnow v. Railway Express Agency*, 331 Mich. 558. In that case, decided in 1951, the Michigan Supreme Court had occasion to pass on a 1943 amendment of the Michigan Workmen's Compensation Law.

The retrospective application of the amendment by the Court of Appeals has given rise to a great deal of confusion and many repercussions. Other states, particularly North Dakota, have enacted similar legislation. This is evidenced in the case of *Nelson v. Westland Oil Co.*, 181 Fed. (2d) 371 (1950), Eighth Circuit. In that decision invoiving three consolidated cases, the Court of Appeals upheld the theory that legislation of this kind is retrospective, but its doubt in doing so is clearly indicated in the following language:

> "If, before these cases are finally determined by the District Court, the Supreme Court of North Dakota shall rule that such actions as these may not be maintained by injured workmen or their dependents upon causes of action which accrued prior to July 1, 1949, the decision of that court, and not our decision, will govern the disposition of these cases."

The only effective way of removing the doubt reflected in the Nelson case is a review in this Court. Petitioners also believe that the retrospective application of the 1952 amendment is plainly erroneous and should be corrected by this Court. *Palmer v. Hoffman*, 63 S. Ct. 477, 318 U. S. 109, 87 L. Ed. 645, 114 A. L. R. 719; *Erie Railroad Co v. Tompkins, supra.*

III.

THE ASSUMPTION OF RISK DOCTRINE AS APPLIED BY THE COURT OF APPEALS

In this connection the Court of Appeals cited the *Restatement of the Law of Torts*, §466, in support of its ruling that the asserted doctrine of assumed risk is not applicable (R. 485). The restatement citation relates to "Types of Contributory Negligence" and states:

"The plaintiff's contributory negligence may be either

(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence of which danger the plaintiff knows or has reason to know, or

(b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm."

Under the heading of comments there is a discussion with reference to "Voluntary exposure to unreasonable risk." The Court of Appeals stated:

> "In order for this doctrine to bar recovery intentional exposure of himself by a workman to a known danger must be so unreasonable that a reasonably prudent man in his position would not do so. *Restatement of the Law of Torts*, §466, Types of Contributory Negligence."

Assuming, but not admitting that petitioners were guilty of negligence, then under this record respondent would under the undisputed testimony be guilty of contributory negligence as a matter of law. It seems that the use of the restatement referred to as authority to eliminate the assumption of risk doctrine is most misleading and fails to distinguish between the doctrine of assumption of risk and the defense of contributory negligence. This question should be authoritatively decided by this Court and thus further the object and character of the Restatement of Laws, that is, "* * * present an orderly statement of the general common law of the United States * * *."

IV.

THE DECISION OF THE COURT OF APPEALS IS PREDICATED ON STATEMENTS OF FACT NOT SUPPORTED IN THE RECORD

The foregoing reason is well supported in the amendment of the Court of Appeals' original opinion. The amendment strikes the sentence "As he (respondent) prepared to climb down, plaintiff saw the crane was not moving" and substituted in its place the following sentence: "As the plaintiff prepared to climb down, the crane was not moving." The new sentence falls short of correcting a most important and decisive misconception of fact for the reason that the record is barren of testimony that might support the substituted sentence.

Furthermore, the decision is based in part on presumptions of facts without any evidence in support. This is illustrated by the following statement:

> "Presumably plaintiff's rope slipped over the side of the pick for two witnesses saw it hanging down from 8 to 10 feet before the crane started to move" (R. 483).

There is nothing in the record to support this presumption. The observations made by the two witnesses, if true, were not connected with the sequence of events leading up to the accident and were so remote in point of time and absolutely lacking in description of any kind as to whether the rope was hanging down far enough to interfere with the movement of the crane, that their testimony is wholly immaterial and without any probative value whatsoever. This becomes evident in the light of respondent's testimony and that of Roberts, his partner. Respondent and Roberts are the only ones possessed of knowledge relative to the rope.

Their positive testimony clearly and unequivocally establishes that the rope was either kicked or knocked off the scaffold by respondent himself just as he got on the pick (R. 267-268). This occurred a split second before the crane came along. The court evidently misconceived that the rope was hanging in the path of the crane for some time prior to the accident and could have been observed by a lookout man on the crane in time to avert the accident. The true situation is described in the last reference to the record and again in the two following questions and answers by Roberts:

> "Q. Well, did you see the line hanging down when you left the south end of the scaffold before you started to go towards your end?
>
> "A. No, I did not; it was laying on the end of the scaffold when I turned to go" (R. 170-171).
>
> * * * * *
>
> "Q. Do you have any idea how that line could have dropped down?
>
> "A. Well, maybe when Red came down the truss on there, maybe his foot knocked it off or something, I don't know" (R. 173).

The foregoing also dispels and negatives another unsupported statement of fact in the opinion, to wit: "* * * plaintiff threw the rope down on the pick and expected to gather up the rope, * * *." It is quite obvious that this comment is used in the sense that respondent expected to pull up the rope that was hanging down from the pick. The fact is he managed to throw the rope on the pick, and therefore, there was no reason for him to expect to gather up the rope. In this connection he said: "Well, at the time I dropped it I didn't think it was off" (R. 265). "Well, I didn't see it hanging down" (R. 267).

The opinion states as a fact that: "The crane operated at so considerable height and the mill was so long that

the employees on the floor could not foresee the possibility of accident so well as someone on the crane" (R. 483). There is no competent testimony to that effect. Furthermore, this statement is most unfortunate in that it implies that a person is liable for the mere failure of guarding against any kind of possible accident. Such is not the law. *Fort Smith Gas Co. v. Cloud*, 75 Fed. (2d) 413. In that case it is said: "* * * to constitute actionable negligence the injury must have been the natural and probable consequence of the alleged negligent act. The consequence of the negligent act must be within the range of probability as viewed by the ordinary man, and consequences which are merely possible cannot be regarded as either probable or natural."

The court's opinion further stated as a fact that: "Defendants had notice of the particular hazard because of the near accidents and dangerous situations which involved the crane shortly before this occurrence" (R. 484). There is no testimony that either the respondent or petitioners were ever confronted with "the particular hazard" involved in this case. The hazard in this case, if it can be so labeled, was of respondent's own creation. The fact that the crane was stopped twice before to pull up paint were perfectly normal operations. The alleged cable incident arose out of an entirely different operation in no way connected with the painters and is not pertinent to the issue in controversy. Respondent and his partner could have taken the same precaution to stop the crane before they began their descent as was their practice in pulling up paint and thus avoided the accident. Their failure to take this simple precaution, along with their failure to look, and respondent's act of kicking the rope off the pick produced and authored the setting of respondent's unfortunate fall (R. 308, 309, 310, 173).

The opinion also stated that respondent "was doing what any ordinary workman would have done under similar circumstances" (R. 484-485). There is no evidence in the record to support such a statement as a fact.

Petitioners verily believe that a correct conception of the material facts of this case will lead to a reversal of the lower courts.

V.

PETITIONERS' MOTION FOR MISTRIAL

Insurance was brought to the jury's attention by respondent in answer to a question propounded by his counsel, Mr. Markle. It purported to elicit the names of doctors who might have rendered medical care. He said: "Well, I had Dr. Goetz. He looked at me. And I had Dr. Maguire, I think, from the insurance company * * *I mean from J. M. Foster's insurance company" (R. 275). This led to a motion for a mistrial (R. 345, 361-362), but was denied, although the trial judge evidenced concern over this development. True, Mr. Markle argued he did not calculate to bring out the foregoing answer (R. 346). Well, let us refer to the case of *Watroba v. City of Detroit,* 334 Mich. 182. Mr. Markle was defense counsel. Mr. Groefsema was attorney for the plaintiff. During the examination of plaintiff's mother by Mr. Groefsema she referred to a man from an insurance company without naming or identifying him. Mr. Markle immediately challenged Mr. Groefsema's good faith. The opinion quotes Mr. Markle as follows:

> "I think it is a deliberate attempt * * * this is a suit against the city. They are afraid they are not going to recover against the city. They are trying to bring in something outside that has noth-

> ing to do with this case. * * * There is no other reason for Mr. Groefsema to ask that question. He must know the answer."

Applying the same reasoning in the instant case, Mr. Markle's statement that he did not calculate "to bring out that answer" loses its force. Even if his contention is accepted at face value, a later statement clearly shows that he deliberately sought a prejudicial answer that was calculated to appeal to the sympathies and emotions of the jury. He said:

> "Certainly the question I was asking him, I can tell you, the answer I wanted was that he had plans to go to Mayo Clinic, but they want five thousand dollars in advance and he hasn't got the money. That is what I wanted to bring out by that question. He is still talking this morning about the Mayo Clinic" (R. 347).

The impropriety of the foregoing as a basis of mistrial or new trial in Michigan is well illustrated in *Dewey v. Perkins*, 295 Mich. 611; *Harker v. Bushouse*, 254 Mich. 187 and *Holman v. Cole*, 242 Mich. 402.

Respondent's aim and plan to prejudice petitioners in the eyes of the jury from an insurance standpoint is further evidenced in the closing argument by counsel for respondent. He said:

> "Counsel has referred solicitously to Mr. Johnson and Mr. Foster, the defendants in this case, the co-partners, as he calls them, of the J. M. Foster Company. They are not very worried about this case, because neither you nor I have seen them here during the case" (R. 433).

True, the trial judge struck this remark, but the harm was done.

VI.

PETITIONERS' MOTIONS FOR DIRECTED VERDICT OF NO CAUSE FOR ACTION AND FOR JUDGMENT NON OBSTANTE VEREDICTO

This discussion does not include any reference to the Workmen's Compensation Law and the assumption of risk doctrine for the reason that these points have already been covered. The remaining issues, (1) negligence and (2) contributory negligence have also been touched upon, consequently, further extensive treatment is not deemed necessary. Briefly, respondent admitted he did not look for the crane when he dropped his rope without shortening it (R. 314). He also admitted he could have made a similar observation before he started to climb down (R. 317), but did not. The only reported and analogous case is *Uzich v. E. & G. Brooke Iron Co.*, 76 Fed. Supp. 788. The plaintiff in that case, also a painter was working 90 feet above the ground, sustained an injury when he grasped a cable that was controlled from the ground by defendant's employees. Recovery was denied as a matter of law.

Respondent's allegations in his complaint as to duties owed him by petitioners, when viewed in the light of the testimony, represent nothing more than afterthoughts concocted in an attempt to pass the responsibility of his accident to persons other than himself. This is most apparent from the admitted fact that respondent went about his work with full knowledge that petitioners never had a safety man on the crane and that the bell on the crane was not used or if so could not be heard because of a great amount of general noise. In short, respondent never had any such duties in mind, and if he did, he never relied on them.

VII.

PETITIONERS' MOTION FOR A NEW TRIAL

The Court of Appeals limited its decision under this heading to a discussion of petitioners' claim that the jury's verdict was excessive. On this point it is essential to take into account the medical testimony. Dr. Honor was asked whether there is any type of labor that plaintiff can perform. He said: "I advised him to take up watchmaking, or he could get a position where he could sit and do inspection work, or sitting and do any kind of work where he did not have to stand" (R. 284). Except for a so-called arthrodesis of the right ankle, a stiffening operation, plaintiff was not in need of future medical surgery (R. 285). The suggested arthrodesis would cost approximately $250.00 (R. 290). Respondent's alleged earning ability was about $5,000.00 per year (R. 86). The Michigan Supreme Court laid down a well defined limit and rule governing recoverable damages which the Court of Appeals and trial court ignored. *Palmer v. Security Trust Co.*, 242 Mich. 163, clearly announces the rule in this connection. The court said: "We had occasion, in *Sipes v. Railroad Co.*, 231 Mich. 404, to point out that a judgment was excessive if it awarded such a sum as would yield, at five per cent, an annual income approximating previous annual earnings and leave the sum intact at the end of life expectancy." Clearly, the instant verdict, $136,500.00, is excessive when viewed in light of this ruling.

For the purpose of the instant petition it is not deemed necessary to cover in detail the many other grounds urged for a new trial. A cursory reading of said motion (R. 461-466) will quickly disclose many prejudicial errors committed during the course of trial, especially the many prejudicial comments and rulings by the trial judge. This

situation, combined with respondent's general appeal to sympathy led to a verdict without support in fact and law.

VIII.

PETITIONERS' CLAIM THAT THIS CASE CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Petitioners believe that the statements, rulings, instructions, and refusal to instruct, by the trial court, as outlined in petitioners' several motions, especially their motion for a new trial, calls for determination by this Court of the limits to which a trial court may go in his statements, comments and rulings without rendering the trial unfair. A study of the cases indicates that this Court has had nothing to say on this subject since its decision in *Quercia v. United States,* 289 U. S. 466.

Respectfully submitted,

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Dated: June 8, 1953.